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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1481

CHARLES EDWARD COX,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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OPINION BELOW

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on 28 November 1972. The Supreme Court of Tennessee denied a petition for certiorari in this case in an order filed 5 February 1973. Both the decision of the Court of Criminal Appeals and the order of the Supreme Court are appended to the petition for certiorari filed on behalf of Charles Edward Cox, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The respondent is not dissatisfied with the presentation of the question by the petitioner, except to note that the issue being raised does not present a federal question of substance.

STATEMENT OF THE CASE

The petitioner, Charles Edward Cox, was convicted on 2 December 1971 in the Criminal Court of Hamilton County, Tennessee of armed robbery and sentenced by the jury to confinement for a period of not more than ten years. The trial judge entered the judgment in accordance with the jury's verdict and announced a sentence of ten years in the state penitentiary. Upon the overruling of petitioner's motion for a new trial, the petitioner prayed for, was granted, and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee. The Court of Criminal Appeals in an unreported opinion filed 28 November 1972 affirmed the judgment of the trial court. On 5 February 1973 the Supreme Court of Tennessee denied a petition for writ of certiorari filed by the petitioner.

ARGUMENT

The respondent contends that the trial court incorrectly denied the motion of the petitioner for a continuance. The motion was based on the allegation that the petitioner's brother, Melvin Luther Cox, was the culprit in the robbery—not the defendant.

As set forth in the statement of facts in the petition and as noted in the opinion of the Court of Criminal Appeals (Appendix A to the petition), the petitioner made an eleventh hour request for a continuance in order to depose brother Melvin who was incarcerated in the federal penitentiary at Leavenworth, Kansas. An affidavit in support of the motion for continuance was filed by petitioner's trial defense

counsel to the effect that Brother Melvin would testify that he committed the offense in question—not the petitioner (Appendix E to the petition). The trial court reviewed the history of the case and determined that he would not grant this late motion.

The Court of Criminal Appeals upheld the trial court's determination upon the motion and determined that nothing was developed in the trial of the case to show that the trial court had abused his discretion in refusing to grant the motion for a continuance. Citing ***State ex rel. Carroll v. Henderson***, 1 Tenn. Crim. App. 427, 443 S.W.2d 689 (1969); ***Oden v. State***, 2 Tenn. Crim. App. 304, 453 S.W.2d 441 (1970); ***Morehead v. State***, 219 Tenn. 271 409 S.W.2d 357 (1966). The Court of Criminal Appeals further explained that when a party assigns error concerning the failure of a trial court to grant a continuance, he bears the burden of showing that the failure to continue the case was prejudicial. The entire record will be reviewed to determine whether or not the motion was properly denied. The ruling will only be reversed if it is shown that the party did not receive a fair trial and that a different result would have been reached had the continuance been granted.

As the Court of Criminal Appeals noted, there is nothing in the record, save the pleadings, that would indicate that brother Melvin would come into court and testify or state via deposition that he was the guilty party. Subsequent to the trial the petitioner filed a timely motion for new trial alleging, ***inter alia***, that the trial court erred in denying the petitioner's motion to continue the case for purposes of taking the deposition of his brother. The motion was heard and denied by the trial judge on 24 January 1972. (Appendices P, Q to the petition). From 28 September 1971

until 24 January 1972 was certainly sufficient time for the trial defense to have procured an affidavit from brother Melvin in support of his allegation that the trial court erred in refusing to grant the motion for a continuance. Tennessee practice allows the submission of affidavits in support of motions for new trial. It is obvious that if the petitioner's brother were willing to testify as asserted in the defense counsel's motion for new trial, such an affidavit could have been procured by the time of the hearing on the motion for new trial and in order to assert the trial court's error in refusing to grant a continuance such an affidavit should have been submitted.

The respondent does not disagree with the petitioner's propositions of law concerning his right to present evidence in his own behalf. However, this case is in no way similar to that of ***Brady v. Maryland***,, 373 U.S. 83 (1963). In ***Brady*** it appeared that the prosecution had suppressed evidence exculpatory to the defendant. In the instant case, there is no such evidence—only the naked allegation that such evidence might exist; if such evidence did exist, it was not within the control of the prosecution.

As petitioner has pointed out, Tennessee Code Annotated, §40-2428 allows a defendant in a criminal case the right to take a deposition as in a civil case. As noted such deposition may be taken by order of the court after notice to the district attorney. Until the day preceding the date of the trial no such request for the taking of a deposition was made. Therefore, it is readily apparent that the motion for a continuance based upon the alleged existence of an exculpatory witness was a dilatory tactic only.

Since there is no evidence in the record which would show that the motion for a continuance was other than a mere dilatory tactic, the respondent submits that the proper

forum for a determination of whether or not such evidence actually existed and whether or not the trial court thus erred in denying the continuance would be at an evidentiary hearing in a federal district court upon a petition for a writ of habeas corpus.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review on a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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